U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAY HARP and DEPARTMENT OF THE AIR FORCE, McCLELLAN AIR FORCE BASE, Sacramento, Calif.

Docket No. 97-2043; Submitted on the Record;
Issued May 25, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a hotel-motel clerk and therefore had a 72 percent loss of wage-earning capacity.

The case has been on appeal previously.[1] In a January 23, 1993 decision, the Board noted that the Office had found that appellant could perform the position of graphics stripper if he had agreed to undergo vocational rehabilitation. The Board, however, found that the Office had not established that appellant had the vocational background to perform the duties of the position because he had not undergone the 10-week training program required for the position. The Board concluded that the Office had not sustained its burden of proof in reducing appellant's compensation. It therefore reversed the Office's decision.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. D. William Zaayer, a Board-certified orthopedic surgeon, for an examination and second opinion. In a July 26, 1993 report, he indicated that x-rays showed marked osteoarthritic changes throughout the lumbar spine. Dr. Zaayer stated that appellant had a normal physiological objective orthopedic examination without any evidence of neurologic involvement. He noted appellant had marked hamstring tightness which would aggravate or cause low back pain. Dr. Zaayer commented that the hamstring tightness would aggravate mechanical low back pain which was exactly what appellant was portraying at the time of the examination without any suggestion of neurological involvement. He noted that a prior computerized tomography (CT) scan showed a degenerative broad based disc bulging. Dr. Zaayer indicated that osteoarthritic changes suggested that a long, ongoing degenerative process was occurring which was not associated with trauma. He stated that any symptoms that may have been present at the time of the April 10, 1984 employment injury would have resolved within 10 days to 4 weeks.

[1] 44 ECAB 409 (1993).

Dr. Zaayer concluded that appellant had no permanent functional impairment or loss of wage-earning capacity that was causally related to the employment injury. He commented that any symptoms remaining were totally apportioned to factors other than the employment injury. Dr. Zaayer indicated that appellant had no findings associated with the employment injury.

In a September 30, 1993 report, Dr. Raymond L. Craemer, a Board-certified orthopedic surgeon, stated that a magnetic resonance imaging (MRI) scan showed a herniated L4-5 disc. He indicated that appellant had exhibited repeated evidence for positive sciatic irritation and L5 nerve root irritability compatible with a herniated disc.

To resolve the conflict in the medical evidence the Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Isaias F. Salazar, a Board-certified orthopedic surgeon, for an examination to resolve the conflict in the medical evidence between Dr. Creamer and Dr. Zaayer. In a January 20, 1994 report, Dr. Salazar noted that appellant complained of intermittent, persistent low back pain and stiffness. He diagnosed an old strain of the lumbosacral spine and degenerated L4-5 disc with mild posterior bulging. Dr. Salazar commented that appellant had employment injuries on April 10, 1984 and October 25, 1985 that were not serious. He indicated that it was very difficult to say whether the degenerative disc at L4-5 was related to the previous injuries. Dr. Salazar stated that a degenerative disc of this type usually occurred with patients whose work required frequent bending and lifting. He noted that appellant did some of these activities at work. Dr. Salazar commented that it was possible appellant may have had a previous degeneration of the disc dating before the employment injury and was aggravated at the time of the employment injury. He related that, although appellant stated that there were some days when he could not get out of bed due to severe pain, in examination he was not having physical pain and significant abnormalities could not be found. Dr. Salazar indicated that appellant could perform other types of activities or be retrained for other work that did not require frequent bending or lifting over 20 to 30 pounds.

In an accompanying work restrictions evaluation form Dr. Salazar indicated that appellant could stand intermittently for four hours a day and sit or walk intermittently for two hours a day. He reported appellant could occasionally lift up to 20 pounds and could occasionally bend, twist, climb, squat and kneel. Dr. Salazar concluded that appellant could work four to six hours a day but commented that he could not indicate when appellant could work eight hours a day.

In a February 15, 1995 work restriction evaluation form, Dr. Craemer indicated that appellant could sit, stand or walk intermittently for four hours a day and lift, bend or squat intermittently for one hour a day. He concluded appellant could not climb, kneel or twist. Dr. Craemer noted that appellant could lift up to 20 pounds. He reported that appellant could work eight hours a day. In a September 12, 1995 report, Dr. Craemer indicated that appellant has lost 50 percent of his ability to lift, bend, stoop and twist. He stated that appellant was able to do work which required minimal lifting and allowed him to sit or stand at will.

In a September 11, 1996 letter, the Office informed appellant that it proposed to reduce his compensation. The Office indicated that it had found that appellant could perform the duties of a hotel-motel clerk, a light position requiring the ability to lift up to 20 pounds. The Office

reported that the position was reasonably available within appellant's commuting area. In a September 29, 1996 letter, appellant contended that he could not work 40 hours a week.

In a January 23, 1997 decision, the Office found appellant could perform the duties of a hotel-motel clerk and therefore had a 72 percent loss of wage-earning capacity. The Office reduced appellant's compensation effective February 2, 1997.

Appellant requested a review of the written record by an Office hearing representative. He submitted in support of his request a September 17, 1996 report from Dr. Craemer that had not been submitted previously. In that report, Dr. Craemer reviewed Dr. Salazar's report and pointed out that Dr. Salazar restricted appellant to working four to six hours a day. He contended that appellant, with such a restriction, would have difficulty getting a position as a hotel-motel clerk and, if he did find such a position, would most likely work at a smaller hotel which would require more lifting. Dr. Craemer concluded that the position would not be appropriate for appellant.

In a May 1, 1997 decision, the Office hearing representative found that the Office's decision to reduce appellant's compensation was appropriate at the time it was issued. She indicated, however, that appellant had submitted sufficient medical evidence to require further development of the medical evidence. She therefore affirmed the decision to reduce appellant's compensation but remanded the case for further development of the medical evidence.

The Board finds that the Office improperly found that appellant could perform the duties of a hotel-motel clerk.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.[3] Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[4].

Dr. Salazar concluded that appellant could work four to six hours a day. He was unable to indicate how long this restriction would last. The Office concluded that appellant could

[2] *Garry Don Young*, 45 ECAB 621 (1994).

[3] *See generally*, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

[4] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

perform the duties of a hotel-motel clerk and found that the position was reasonably available within appellant's commuting distance. However, as appellant was restricted to working only part time, the Office did not indicate whether the position was reasonably available on a part-time basis within appellant's commuting area. The Office's determination that the position was reasonably available within appellant's commuting area therefore was flawed. As a result the Office failed to meet its burden of reducing appellant's compensation as of the time it made its decision.[5]

The decisions of the Office of Workers' Compensation Programs, dated May 1 and January 23, 1997, are hereby reversed.

Dated, Washington, D.C.
May 25, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[5] *Raymond E. Romero*, 34 ECAB 1010 (1983); *Wordie G. Turner*, 19 ECAB 530 (1968).